IN THE

Supreme Court of the United States

October Term, 1960

No. 419

LINUS PAULING,

Petitioner,

vs.

JAMES O. EASTLAND, THOMAS J. DODD, OLIVER GASCH and JOSEPH C. DUKE,

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITIONER'S REPLY TO BRIEF FOR THE RESPONDENT IN OPPOSITION.

The fact, if it be a fact (Br. in Opp. 7), that this is an unprecedented case, rather than arguing against the granting of certiorari by this Court is a precise and cogent reason why hearing should be granted. It cannot be gainsaid that the question is important, nor do respondents attempt to do so.

But the argument being pressed by petitioner is not really unprecedented nor is it without judicial approval. In *Hearst v. Black*, 87 F. 2d 68, 71 (C. A. D. C. 1936), it was clearly recognized that if judicial assistance had been asked for *before* the order had been executed, appropriate injunctive relief would have been granted.

(a) Petitioner, of course, mightily takes issue with respondents' view (Br. in Opp. 8) that there is no justiciable controversy before the Court.

Thus, respondents say (*ibid*): "An order to turn the documentary data over to the Subcommittee has not yet been issued." This is a most tenuous and refined, indeed perhaps even a semantic, view of the facts. Petitioner was ordered and directed (Galley Proof, p. 30):

> "to appear . . . and to bring with you all signatures or purported signatures to the petition presented by you to the Secretary General of the United Nations on January 15, 1958, together with all letters of transmittal by which, or in connection with which, such signatures were transmitted to you or received by you."

The very purpose of this order was for petitioner to bring to the committee the letters of transmittal[1] to be exhibited to the committee—so the committee could see them. Whether the letters are to be "turned over" to the committee is beside the point. It is the disclosure which is in issue here. This is the thing against which petitioner seeks and is entitled to judicial relief.

In *Santa Fe Pacific R.R. Co. v. Lane*, 244 U. S. 492, 498, where the Secretary of the Interior had merely made a "demand" (not even an order or direction, as here) upon plaintiff, this Court said:

> "The plaintiff was not required, in order to test the validity of the demand, . . . to rely entirely upon defending such suit as might be brought by the Attorney General. On the contrary, if the

[1]The signatures are not in issue here.

> demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity . . . The hazards and embarrassment incident to any such course were such as to entitle it to act promptly and affirmatively . . ."

Accordingly, respondents are quite in error when they say (Br. in Opp. 8): "At this time the questions posed by the complaint arise wholly in the abstract." The questions here are definite and concrete. A definitive *order has been made*. Is it or is it not valid?

Respondents are clearly in error when they say (Br. in Opp. 8) that the committee has not yet rejected petitioner's legal and non legal objections. The transcript (Galley proof, pp. 23-30) discloses that at some length petitioner explained his reasons for advising the committee that he would not comply with the request (*e.g.* Galley Proof, pp. 24-25, 27), that his counsel made the legal objections (Galley Proof, p. 35), that the committee members sought to dissuade petitioner and explained the reasons why the committee could not accept petitioner's position (Galley Proof, pp. 28-29), all of which was culminated by the committee's order, through the Chairman, here in question.

Accordingly, the "administrative remedies", so to speak, have been exhausted.

(b) That declaratory relief is a discretionary remedy and that the courts below ruled against petitioner, does not end the matter. The discretion given the courts is the right to exercise a sound, judicial discretion, not an arbitrary one. The discretion must be "reasonably

exercised." (*Sani-Top, Inc. v. North American Aviation*, 261 F. 2d 342, 349 (C. A. 9, 1958).)

One of the very reasons for, and uses of, the declaratory judgment procedure, is to provide a remedy to a suitor who cannot otherwise have his question adjudicated until his adversary takes the initiative (*Employers Liability Assur. Corp. v. Ryan*, 109 F. 2d 690, 691 (C. C. A. 6, 1940)). Respondents base their position that this is not a proper case for relief to be granted on the erroneous concept, articulated by the court below (Br. in Opp. 10; Pet. App. 7a) that what is sought here is "a declaratory judgment respecting the validity of *contemplated* Congressional action." (Italics added.) But such is simply not the case. The Congressional action here attacked is not contemplated: it has already occurred. It is the validity of *that* action—that order—which is involved here.[2]

Respondents express concern (Br. in Opp. 10-11) that what is sought here is a ruling that would reach beyond this particular case and establish a principle of judicial "superintendence and power of pre-audit over the inquiries of Congressional committees." Respond-

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[2]Accordingly, respondents' quotation (Br. in Opp. 11, n. 15) from *Hearst v. Black*, 87 F. 2d 68, 71-72, is inapposite. More to the point from the *Hearst* case is the court's recognition (87 F. 2d at 71) that "if the bill had been filed while the trespass was in process (i.e. before the order had been effectuated) it would have been the duty of the lower court by order on the commission or the telegraph companies or the agent of the committee *to enjoin the acts complained of*." (Parentheses and italics added.)

ents thus set up a straw man not justified by the facts of this case and then proceed to knock it down.

The cases conjured up by respondents (Br. in Opp. 12) are simply not the case at bar. The Court is being asked merely to hear and determine the facts of *this* case, a case involving an actual, precise and concrete order which the committee has already made *after* hearing and overruling petitioner's objections thereto.

(c) That constitutional questions are involved in this case (Br. in Opp. 12) does not mean that this Court should not hear the case. Indeed it "is of the very essence of (the) judicial duty" of this Court to decide constitutional questions. (*Marbury v. Madison*, 1 Cranch, 137, 178.)[3]

Respondents' position is based upon the same erroneous view of the facts that (Br. in Opp. 12): "the disagreement has not as yet 'taken on fixed and final shape.'" As we have attempted to point out, this is simply not the case. Presented here is a concrete situation, ripe for adjudication.

(d) That, as respondents show (Br. in Opp. 13-14), another remedy may be available to petitioner to test the validity of the committee's action, *after* petitioner has been required "to determine whether the suspect is a mushroom or a toadstool" by eating it

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[3] *Cf.* Mr. Justice Jackson, dissenting, in *Eisler v. United States*, 338 U. S. 189, 196: "I do not think we can run away from the case just because Eisler has."

(Borchard, *Declaratory Judgments*, 2d Ed., 278), is no ground for denying relief now. The Declaratory Relief Act itself (28 U. S. C. 2201) and Rule 57, Federal Rules of Civil Procedure, provide just to the contrary.

The case falls directly within this Court's Rule 19(1)(b), 3d phrase: the court below "has decided an important question of federal law which has not been, but should be, settled by this court."

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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